

**Objection to Issuance of Construction Permit Application Plans and Specifications for Lift
Station and Force Main Permit Approval No. 21642
Camp Indicoso
Springville, Lawrence County, Indiana
2016 OEA 27, (15-W-J-4844)**

OFFICIAL SHORT CITATION NAME: When referring to 2016 OEA 27 cite this case as
Camp Indicoso, 2016 OEA 27.

TOPICS:

construction of sanitary sewer system	estimated future average
sanitary sewer force main	design wastewater flow
Regional Sewer District	non-party expansion
estimated wastewater flow	Summary judgment
projected average flow	opposing party fail to respond
hydraulic capacity	I.C. § 13-13, <i>et seq.</i>
maximum capacity	I. C. § 4-21.5-3-23
current users	327 IAC 3-6-4(c)
gallons per day	327 IAC 3-6-7
average daily treated wastewater flow	327 IAC 15-15-9
expected flow rate	Ind. Trial R. 56

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES

IDEM: Sierra L. Alberts, Esq.
Petitioners: James G. Pittman, Esq.; Pittman Emery & Nikirk
Respondent: Henry L. Kelln, Esq.; Faegre Baker Daniels LLP

ORDER ISSUED:

August 2, 2016

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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3. On November 21, 2015, Jim and Ann Hamilton, Mary Smale, Donny Wright, Phil and Linda Conner, Richard Ramsey, Benny Franklin, Derek Thompson, Bernard Parker, Charles Franklin, Rick Godsey and Bill Gilbert, Jr. (collectively referred to as the Petitioners) filed a petition for review of the Approval with the OEA.
4. The Petitioners filed another Petition for Review on December 31, 2015. In addition to the original Petitioners, Pete Stephenson and Rhea Stephenson were included in the December 31, 2015 Petition.
5. An Amended Petition for Review was filed on March 1, 2016. The Petitioners objected to the issuance of the approval on the following basis:

The Approval of Decision indicates that, after this project is complete, the estimated wastewater flow will be 96% of the hydraulic capacity of the Briarwood WWTP. The projected average flow of the Camp that will be added to the current flow of the Briarwood WWTP will be 16, 530 gallons per day. Briarwood WWTP's maximum capacity is 37,000 gallons per day, leaving a maximum flow for the current users of Briarwood WWTP of 20,470 gallons per day. Briarwood WWTP's flow from current users exceeded 20,470 gallons per day average for the following months: July 2012, January 2013, February 2013, March 2013, April 2013, December 2013, January 2014, March 2014, April 2014, May 2014, March 2015, April 2015, June 2015, July 2015, and August 2015. Petitioners request that permit conditions require that the Briarwood WWTP increase its hydraulic capacity in an amount sufficient to properly handle expected flow rates.

6. Permittee/Respondent Camp Indicoso filed its Motion for Summary Judgment on March 9, 2016. The Petitioners did not file a response, nor did they seek an extension of time to respond.
7. The Approval states that the Briarwood WWTP has an average design capacity rating of 37,000 GPD¹ (0.037 MGD²) and treated an average wastewater flow of 19,200 GPD in 2014, which is 52% of its hydraulic capacity. The Approval notes that "estimated future average design wastewater flow of 16,530 GPD from Camp Indicoso plus 19,200 GPD results in 35,730 GPD which is 96% of the hydraulic capacity of the Briarwood WWTP."³

¹ Gallons per day

² Million gallons per day

³ Decision of Approval, Authorization of Construction of Sanitary Sewer System, Approval No. 21642, page 3 of 6, Exhibit C, Camp Indicoso's Motion for Summary Judgment.

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8. The Approval further states that sanitary sewer construction completed in May, 2015 resulted in “an average daily treated wastewater flow at Camp Indicoso of 2,000 GPD in June 2015, 3,800 GPD in July 2015, and 1,200 GPD in August 2015. The estimated future average design wastewater flow at Camp Indicoso is 16,530 GPD which includes a significant increase related to a camp expansion.”⁴
9. As required by 327 IAC 3-6-4(c), Chad Reitmeyer, president of South Central Regional Sewer District, certified that the proposed sanitary sewer meets all requirements of 327 IAC 3; that the daily flow will not cause overflowing or bypassing; that there is sufficient capacity in Briarwood WWTP to treat the additional flow and remain in compliance with its NPDES permit; that the average flow will not result in hydraulic or organic overload; and that the ability of the system to comply with the regulations is not contingent on water pollution/control facility construction that have not been completed and put into operation.⁵
10. Pursuant to 327 IAC 3-6-7, an applicant for a construction permit must present evidence of the following: (1) The peak daily flow rate, in accordance with section 11 of this rule generated in the area that will be collected by the project system, will not cause overflowing or bypassing in the collection system from locations other than NPDES authorized discharge points; (2) Sufficient capacity exists in the receiving water pollution treatment/control facility to treat the additional daily flow; (3) The receiving water pollution treatment/control facility will remain in compliance with applicable NPDES permit effluent limitations; (4) The sanitary sewer or collection system that is the subject of the construction permit application is to connect to a water treatment/control facility that has been completed and put into operation; (5) The proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers. Jeffrey S. Fanyo, as the registered professional engineer for the project, certified each of these items.⁶
11. Briarwood WWTP has sufficient capacity to treat the flow from Camp Indicoso.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.*

⁴ Decision of Approval, Authorization of Construction of Sanitary Sewer System, Approval No. 21642, page 2 of 6, Exhibit C, Camp Indicoso’s Motion for Summary Judgment.

⁵ Application for Sanitary Sewer Construction Permit per 327 IAC 3, page 4 of 9, Exhibit D, Camp Indicoso’s Motion for Summary Judgment.

⁶ Application for Sanitary Sewer Construction Permit per 327 IAC 3, page 5 of 9, Exhibit D, Camp Indicoso’s Motion for Summary Judgment.

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2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the environmental law Judge (the “ELJ”), and deference to the IDEM’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d).
4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env’tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). “Standard of proof generally has been described as a continuum with levels ranging from a “preponderance of the evidence test” to a “beyond a reasonable doubt” test. The “clear and convincing evidence” test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test.” *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The “substantial evidence” standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *Gas America 347*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF #9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26,41.
5. The OEA shall consider a motion for summary judgment “as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.” I.C. § 4-21.5-3-23. Trial Rule 56 states, “The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000).
6. The moving party carries the burden of establishing summary judgment to be appropriate. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind.Ct.App. 2000). All facts and inferences must be construed and issues of doubt resolved by the court in the fashion most favorable to the non-moving party. *City of Indianapolis v. Buschman*, 988 N.E.2d 791 (Ind. 2013) *see also; Town of Avon v. W. Cent. Conservancy Dist.*, 957 N.E.2d 598, 602 (Ind. 2011). After the burden of proof regarding summary judgment has been established by the moving party, the burden shifts to the non-moving party to demonstrate through specific evidence that there lies a genuine issue of material fact. *Bushong* at 474, (2003). “[I]t is well-settled that speculation may not be used to manufacture a genuine issue of fact.” *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001); *see also Borcky v.*

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Maytag Corp., 248 F.3d 691, 695 (7th Cir. 2001) (“The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment Speculation will not suffice.”). Still, the trial court’s decision will be assessed to ensure that the non-movant was not improperly denied his or her day in court. *Alexander v. Marion Cnty. Sheriff*, 891 N.E.2d 87, 92 (Ind. Ct. App. 2008) (quoting *City of Mishawaka v. Kvale*, 810 N.E.2d 1129, 1132-33 (Ind. Ct. App. 2004)), *trans. denied*. “We may affirm the grant of summary judgment on any basis argued by the parties and supported by the record.” *CFS, LLC v. Bank of Am.*, 962 N.E.2d 151, 153 (Ind. Ct. App. 2012).

7. “Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence but the court shall make its determination from the evidentiary matter designated to the court.” T.R. 56(C). “[T]he lack of opposition to another’s motion for summary judgment does not result in ‘an automatic summary judgment’ because the ‘moving party still bears the burden of showing the propriety of summary judgment.’” *Alexander v. Dowell*, 669 N.E.2d 436, 439 (Ind. Ct. App. 1996) (quoting *Carroll v. Lordy*, 431 N.E.2d 118, 121 (Ind. Ct. App. 1982.))
8. An initial issue must be addressed. The Petitioners’ prayer for relief asks the OEA to order Briarwood WWTP to “increase its hydraulic capacity in an amount sufficient to properly handle expected flow rates.”⁷ Briarwood WWTP is not a party to this action. As a non-party, Briarwood WWTP cannot be bound by the OEA’s judgment. “It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Taylor v. Sturgell*, 553 U.S. 880, 884, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115. Thus, even if the OEA were to find in the Petitioners’ favor, the OEA would not be authorized to enter an order granting the Petitioners’ prayer for relief.
9. Further, requiring the Briarwood WWTP to expand would violate the certification requirements under 327 IAC 3-6-4(c) and 327 IAC 3-6-7, each of which require that the receiving wastewater treatment plant have sufficient capacity at the time of the application and is not contingent upon future uncompleted construction.
10. Camp Indicoso presented substantial evidence that Briarwood WWTP has the capacity to accept the flow from Camp Indicoso. IDEM’s decision to consider annual average flow to determine plant capacity is supported by substantial evidence. This shifted the burden of proof to the Petitioners. However, the Petitioners did not respond. The allegations made in the Amended Petition for Review are insufficient to create an issue of fact. There is no genuine issue of material fact that Briarwood WWTP has sufficient capacity for the flow from Camp Indicoso. Therefore Camp Indicoso is entitled to summary judgment in its favor.

⁷ Amended Petition for Review, page 1, filed March 1, 2016.

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FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that **summary judgment is GRANTED to Permittee/Respondent Camp Indicoso. The petitions for review are DISMISSED.** All further proceedings are **VACATED.**

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 2nd day of August, 2016 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge